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August 29, 2008

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445-12 Street S.W.
Washington, D.C. 20554

Re: Assessment and Collection of Regulatory Fees for Fiscal Year 2008
MD Docket No. 08-65, RM No. 11312

Dear Ms. Dortch:

Kelley Drye & Warren LLP ("Kelley Drye") hereby submits these comments in the above-captioned proceeding concerning the International Bearer Circuits Fee ("IBCF"). In its August 1, 2008 press release, the Commission stated that it is still evaluating "the appropriate regulatory fee method assessed on providers of International Bearer Circuits, including submarine cable operators" and is leaving the docket open for additional comment during this review period.[1] Kelley Drye is a law firm that advises various entities regarding compliance with FCC rules and regulations, including both telecommunications carriers and non-common carrier submarine cable licensees regarding the IBCF. As such, Kelley Drye has a direct interest in the Commission's decision whether and how to modify the IBCF rules. Kelley Drye wishes to make clear that these comments do not necessarily reflect the position of any law firm clients.

The Commission should rule that the IBCF does *not* apply to non-common carrier submarine cable operators. The Commission cannot impose the IBCF on non-common carrier submarine cable operators at this time because the Commission does not have the legal authority to do so. The fee schedule in Section 9(g) of the Communications Act of 1934, as amended (the "Act"),[2] requires that the Commission to assess fees for international circuits on "Carriers." As

1 "FCC Examines Fees Used to Fund Commission Budget," rel. Aug. 1, 2008.

2 47 U.S.C. § 159(g).

the Commission has acknowledged, the word "Carrier" as used in Section 9(g) takes its meaning from Section 3(1) of the Act, which defines "carrier" to mean "common carrier."[3] Thus by its terms, the Act does not give the Commission the authority to assess the IBCF on non-common carrier submarine cable operators.

While the Act permits the Commission to amend the fee schedule, it imposes specific requirements on the Commission in making such amendments. Section 9(b)(3) of the Act allows the Commission to amend the fee schedule if the Commission determines that an amendment is necessary to comply with the requirements of Section 9(b)(1)(A).[4] Section 9(b)(1)(A) requires the Commission to adjust its regulatory fees "to take into account factors that are reasonably related to the benefits provided to the payor of the fee by the Commission's activities . . . and other factors that the Commission determines are necessary in the public interest."[5] Furthermore, Section 9(b)(3) permits amendments to the fee schedule only where such modifications "reflect additions, deletions, or changes in the nature of its services as a consequence of Commission rulemaking proceedings or changes in law."[6]

The Commission completely ignored these requirements in modifying the fee schedule to impose the IBCF on non-common carrier submarine cable operators. To this day, the Commission has never justified its decision to impose the IBCF on non-common carrier submarine cable operators on the basis of changes in the Commission's services that could be alleged to flow from earlier rulemaking proceedings or changes in law. Nor has the Commission ever explained how the amount of the IBCF reasonably relates to the benefits received by non-common carrier submarine cable operators as a result of the Commission's activities. Indeed, the Commission has never offered *any* justification or explanation whatsoever for its decision to impose the IBCF on non-common carrier submarine cable operators. Rather, the Commission in its 1994 report and order implementing the fee schedule imposed the IBCF on non-common carrier submarine cable operators without explanation, as if it were a *fait accompli*.[7]

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3 47 U.S.C. § 151(10); *see Assessment and Collection of Regulatory Fees for Fiscal Year 1998*, 13 FCC Rcd 19820 (1998) at ¶ 62.

4 47 U.S.C. § 159(b)(3)

5 47 U.S.C. § 159(b)(1)(A).

6 47 U.S.C. § 159(b)(3); *see Comsat Corporation v. Federal Communications Commission*, 114 F.3d 223, 227 (D.C.Cir. 1997) ("*Comsat*").

7 *See Implementation of Section 9 of the Communications Act, Assessment and Collection of Regulatory Fees for the 1994 Fiscal Year,* 9 FCC Rcd. 5333, 5367 (1994) ("The fee is to be paid by the facilities-based common carrier activating the circuit in any transmission facility for the provision of service to an end user

It is clear from court decisions interpreting Section 9(b)(3) that changes the Commission makes to the fee schedule cannot stand without the explanation and justification required by Section 9(b)(3). In *PanAmSat*, the court upheld the Commission's decision to impose the IBCF on non-common carrier satellite operators, but only because the Commission expressly and adequately justified the new fee assessment in its report and order.[8] In its report and order, the Commission had invoked various rulemaking changes and concluded that these changes had caused an increase in Commission oversight of satellite licensees such as PanAmSat.[9] In contrast, the court in *Comsat* found that the Commission had acted outside the scope of its statutory authority in charging Comsat signatory fees and so vacated the Commission's rule.[10] The court held that the Commission had no lawful basis for the signatory fee because the Commission had not imposed the fee as a consequence of rulemaking proceedings or changes in law.[11]

Thus, since the Commission has never satisfied the requirements of Section 9(b)(3) for amending the fee schedule to include non-common carrier submarine cable operators, the Commission lacks the legal authority necessary to impose the IBCF on such operators. At a minimum, the imposition of the IBCF on non-common carrier submarine cable operators in 2008 and previous years could not be enforced as a matter of law due to the Commission's failure to satisfy Section 9(b)(3).[12]

On a going-forward basis, Kelley Drye submits that the express requirements in Section 9(b)(3) for imposing the IBCF on non-common carrier submarine cable operators cannot be satisfied. There is general agreement on the record in this proceeding that the Commission's regulation and oversight of non-common carrier submarine cable operators have declined significantly over the last 15 years. Even AT&T, which opposes the joint reform proposals submitted on the record, has not disagreed with this conclusion, but rather has asserted its view

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or resale carrier. Private submarine cable operators also are to pay fees for circuits sold on an indefeasible right of use (IRU) basis or leased in their private submarine cables to any customer of the private cable operator.)

8 *See PanAmSat Corp. v. FCC*, 198 F.3d 890 (D.C. Cir. 1999) ("*PanAmSat*").

9 *See PanAmSat* at 898, *citing Assessment and Collection of Regulatory Fees for Fiscal Year 1997,* 12 FCC Rcd 17161, 17189 and n. 30-32 (1997).

10 *See Comsat* at 227-228.

11 *Id.*

12 *E.g., Independent Community Bankers of America v. Board of Governors*, 195 F.3d 28, 34 (D.C. Cir. 1999); *Graceba Total Communications, Inc. v. FCC*, 115 F.3d 1038, 1040-41 (D.C. Cir. 1997); *Functional Music, Inc. v. FCC*, 274 F.2d 543, 546 (D.C. Cir. 1958).

that FCC oversight has declined similarly for both submarine cable licensees and facilities-based common carriers.[13] This is not a situation, as occurred in the *PanAmSat* case, where the Commission's decision to deregulate an industry sector effectively caused the Commission to expend greater resources in regulating and monitoring that sector in the future. To the extent there has been any variability in the Commission's oversight of non-common carrier submarine cable operators over the years, there is no causal connection between any such variability and any "rulemaking proceedings or changes in law." Also, unlike the satellite operators involved in the *PanAmSat* case, non-common carrier submarine cable operators do not use scarce spectrum resources that require ongoing Commission monitoring and administration. Therefore, the requirements of Section 9(b)(3) cannot be satisfied, and the Commission is required by law to terminate the IBCF as applied to non-common carrier submarine cable operators.

Sincerely,

Robert J. Aamoth
Joan M. Griffin

13 See Letter from A. Alvarez, AT&T Inc., to M. Dortch, FCC (July 25, 2008), Attachment at 2 ("Since 1996, Commission regulation of international facilities-based carriers has been reduced to an equal or greater extent than regulation of submarine cable operators"); see also Reply Comments of AT&T, Inc., MD Docket No. 08-65, RM No. 11312, June 6, 2008, at 15. Kelley Drye does not address in this letter whether AT&T is correct that FCC regulation has declined similarly for submarine cable licensees and facilities-based common carriers.